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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973.

NO. 73-680

GARY E. SECHLER,

Petitioner,

vs.

TRANS WORLD AIRLINES, INC.,
a California corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT,
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, AND TO
THE SUPERIOR COURT OF LOS ANGELES
COUNTY.

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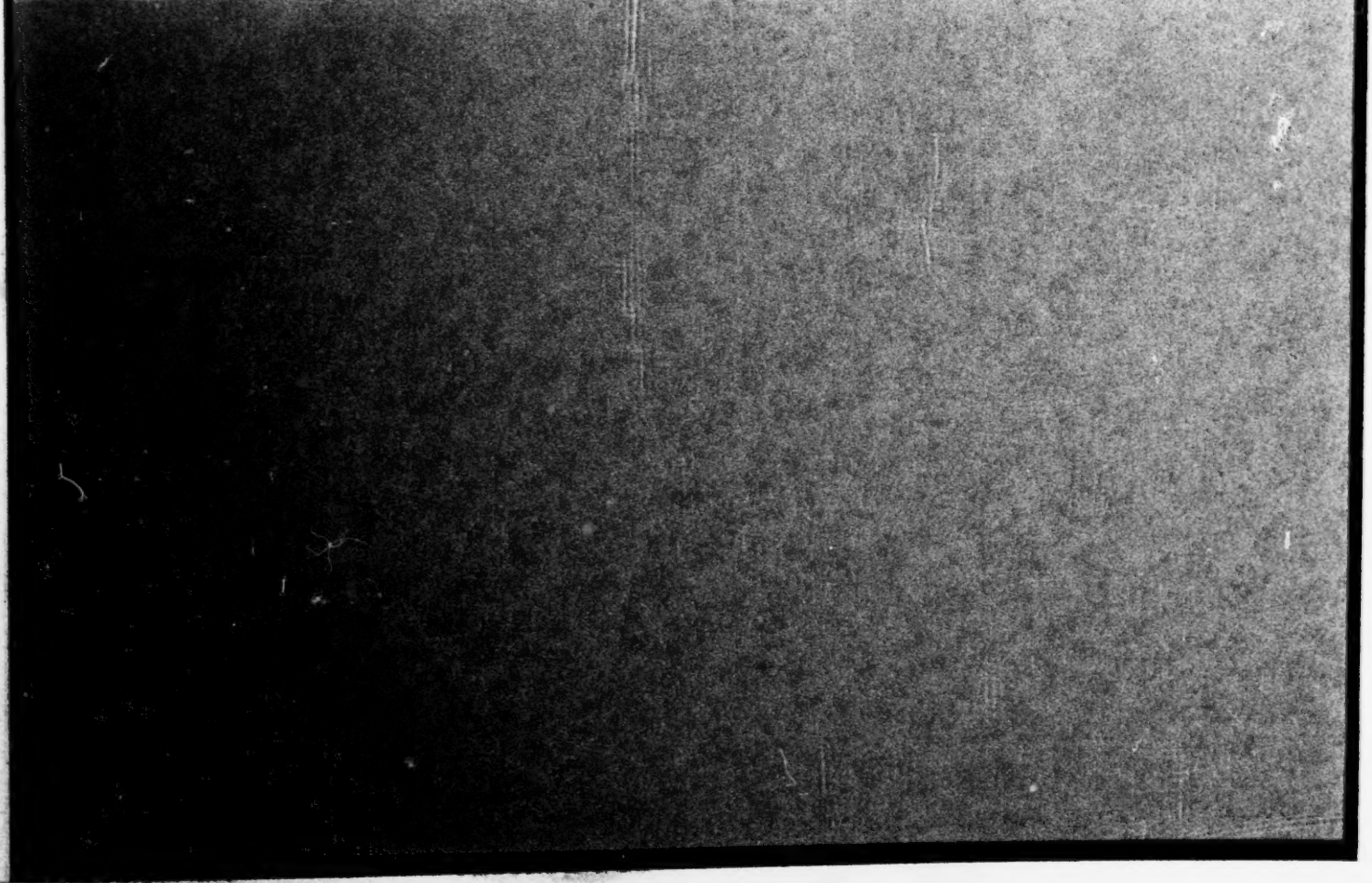

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COUNTY.

Petitioner, GARY E. SECHLER, prays that a writ of certiorari issue to review the Judgment of the Superior Court of Los Angeles County and the Opinion of the Court of Appeal of the State of California,

Second Appellate District, which Appellate Court issued its remittitur to the said Superior Court on May 29, 1973 affirming the Judgment of said Superior Court.

CITATIONS TO OPINION BELOW

The Findings of Fact and Judgment by the trial court herein are unreported and are reprinted in Appendices C and D hereof. The opinion of the Court of Appeal for the State of California is unreported and is reprinted in Appendix B hereof.

JURISDICTION

The Judgment of the Los Angeles Superior Court was entered on March 2, 1972 and appeal was taken to the California Court of Appeal whose opinion was rendered on May 22, 1973. Thereafter, a hearing was denied by the California Supreme Court on July 18, 1973 and

the California Court of Appeal issued its remittitur to the Los Angeles Superior Court on July 25, 1973. Under State law, the Judgment of the Superior Court became final on August 24, 1973.

This writ is sought pursuant to the provision of 28 United States Code section 1257(3) on the grounds that the instant action draws into question the validity of a statute of the United States (to wit: 49 U.S. Code, section 1301, et seq.) on the ground of its being repugnant to the Constitution of the United States.

The Complaint in the instant action, the argument of council in the trial court, the Appeal from the Judgment of the trial court, and the Petition for Hearing in the California Supreme Court have all raised the issue that the construction and application of said statute operated, in the case at bar, to deprive petitioner of

his property without due process of law contrary to the provisions of the Fifth Amendment of the United States Constitution

QUESTION PRESENTED

Whether the liability of an air carrier for baggage loss in interstate commerce may be limited if it complies with the tariff rules fixed or approved by the Civil Aeronautics Board, even though the contract between the air carrier and the passenger may be an adhesion contract and even though the passenger did not know of the limitation and acted in all respects as a reasonably prudent person.

STATUTE INVOLVED

The statutory provisions involved are set forth in the Federal Aviation Act of

1948, 49 U.S.C.A., section 1301 et seq., and specifically section 403(a) of said Act, 49 U.S.C.A. section 1373(a), which statute is set forth in Appendix A hereto.

STATEMENT

Respondent lost the baggage of petitioner while the latter was a fare-paying interstate air passenger. The baggage contained the accumulative results of three years research by petitioner dealing with Marine Microbiology, the value of which greatly exceeded $500. Respondent refused to pay petitioner more than $500 on account thereof. Petitioner filed suit in the Los Angeles Superior Court resulting in findings that in the exercise of reasonable care, petitioner did not read his baggage check, did not read his ticket, did not see signs posted at the passenger check-in counter, and had no

actual knowledge of any limitation of liability for lost baggage.

Petitioner urged in his Complaint, and in arguments before the trial court and the California Court of Appeal that to bind a passenger to limitations of liability by application of an air tariff of which he has no reasonable opportunity to learn, unfairly deprives him of his property. The California courts deciding this case held contrary, stating that duly filed tariffs under the Federal Aviation Act are binding upon a passenger even without actual knowledge or a reasonable opportunity to know thereof.

REASONS FOR GRANTING THE WRIT

1. There is no reason for interstate aviation to be treated differently than interstate rail carriage. Much has been made in this case (see Opinion of

California Court of Appeal, page 7 thereof) and in prior federal cases of the fact that the Interstate Commerce Act contains the "Carmack Amendment" [49 U.S.C.A. §20(11)] while that similar statutory plan, the Federal Aviation Act, does not. The "Carmack Amendment" prohibits carriers from limiting their liability to less than the full value of lost property through tariffs filed with the Interstate Commerce Commission. However, the "Carmack Amendment" is merely a declaration of the federal common law as it existed at the time. Adams Express Co. vs Croninger, 226 U.S. 491, 511 (1913). Also, dissent in Lichten vs Eastern Airlines, 189 F.2d 939; 70 Harvard Law Review 1282, 1287: Note: Air-Carrier Tariff Limitations.) That being the case, it is anomalous and inconsistent that the omission of such amendment from the Federal

Aviation Act should be construed as permitted a major departure from the federal common law.

2. Similar limitations of liability have been construed not effective without passenger knowledge in the case of interstate rail carriage (New York N.H. & H.R. Co. vs Nothnagle, 346 U.S. 128 [1953], interstate motor carriage (Bauer vs Jackson, 15 Cal.App.3d 358, 371 [1971], intrastate rail or motor carriage (Muelder vs Western Greyhound Lines, 8 Cal.App.3d 319, 332 [1970]), international air carriage (Lisi vs Alitalia-Linee Aeree Italiane, S.p.A., 370 F.2d 508, 514 [2d Circ., 1967] aff'd per curiam, 390 U.S. 455), ocean carriage (Silvestri vs Italia Societa Per Agioni Di Navagazione, 388 F.2d 11 [2d Circ., 1968]), and (by extension) to intra-

state air carriage (Muelder vs Western Greyhound, supra.). Consistency alone demands the same rule for interstate air carriage.

3. The reasoning of Southwestern Sugar and Molasses Co. vs River Terminals Corp., 360 U.S. 411, 416-418 [1959] is inapposite here. That case dealt with a limitation of liability between two commercial firms. A different situation is presented where, "It is recognized that the carrier and the individual customer are not on equal footing. The latter cannot afford to higgle or stand out and seek redress in the courts." New York N.H. & H.R. Co. vs Nothnagle, 346 U.S. 128, 135 (1952).

4. The refusal of the California Supreme Court to grant a hearing herein

operates to sanction a contract of adhesion wielded against individual customers who have no choice in the matter. The superior bargaining power of a common carrier over a member of the public it serves has long been recognized. Bills of lading and shippers receipts have been held to possess the characteristics of an "adhesion contract": Chandler vs Aero Mayflower Transit Co., 374 F.2d 129, 135 (4th Circ., 1967). Consent in these adhesion contracts is a fiction. The party has no time to read the limitation, may have no opportunity to learn of it, would not understand it if he took the time, would not be able to find anyone to change it if he took the time to, and would not be able to complete the transaction if he insisted upon a change from the standard form.

Petitioner herein was on his

first air plane ride. He was handed a ticket containing, on its reverse face, 1292 words among which are 73 words dealing with a limitation of liability to "250 French gold francs consisting of 65-1/2 milligrams of gold with a fineness of nine hundred thousandths or its equivalent per kilogram." (Exhibit 2) The entire ticket upon which the foregoing is printed is, in size, seven and one-half inches wide by three and one-quarter inches long. The printed material, including the above quotation, covers almost 17 square inches: 76 words per square inch. Volume 33 of the United States Supreme Court Reports, Lawyer's Edition, 2d Series, contains on an average, approximately 17 words per square inch. The T.W.A. "Conditions of Contract" contain, as noted, 1292 words. The Bill of Rights of the United States Constitution contains

469 words. The Sherman Anti-Trust Act contains approximately 330 words. Executive Order No. 11615 Providing for Stabilization of Prices, Rent, Wages, and Salaries, dated August 15, 1971 [Phase I] contains approximately 924 words.

In enforcing T.W.A.'s limitation, the Courts below have paid petitioner $500 for three years of technical laboratory work and professional analysis.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue.

Respectfully submitted,

HENRY G. BODKIN, JR.
with
TIMOTHY J. SARGENT,
Counsel for Petitioner.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, being first duly sworn, depose and say: That I am, and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within proceedings; that my business address is 4201 Wilshire Boulevard, Suite 400, Los Angeles, California 90010; that on October 19, 1973, I served the within PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT, TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, AND TO THE SUPERIOR COURT OF LOS ANGELES COUNTY on the parties named below, by depositing a true copy thereof, enclosed in a sealed envelope, with postage

thereon fully prepaid, in a United States post office mail box at Los Angeles, California, addressed as follows:

Brill, Hunt, DeBuys & Burby
Attorneys at Law
510 South Spring Street
Los Angeles, California 90013

Clerk of the California Supreme Court
4050 State Building
350 McAllister Street
San Francisco, California 94102

Clerk of the Court of Appeal
Second Appellate District
State Building
217 West First Street
Los Angeles, California 90012

Honorable A. A. Scott
Judge, Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012

Executed on October 19, 1973 at Los Angeles, California.

Timothy J. Sargent

SUBSCRIBED AND SWORN to before me this 19th day of October, 1973.

Notary Public in and for said County and State.